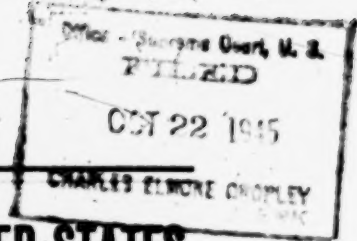


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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
HANEY, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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| Haney employed by respondents' railroads in interstate commerce at the time of his death.. | 34 |
| (1) The evidence adduced at the trial of the cause on the issue of respondents' liability under the Employers' Liability Act for the death of Haney, as for negligence on the part of both respondents amply sufficed to make those issues one for the jury, and Division No. 1 of the Su- preme Court of Missouri erred in holding that petitioner was not entitled to have such issues submitted | 36 |
| (2) The evidence adduced at the trial on the issue of respondent, Illinois Central Railroad Com- pany's liability for failing to furnish Haney, its employee, with a reasonably safe place to work was amply sufficient to make that issue one for the jury, and Division No. 1 of the Supreme | |

Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury..... 42

(3) The ruling of the Supreme Court Court of Missouri, Division No. 1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work which resulted in his death, but that to submit the case on those theories would invite a verdict based on conjecture and speculation, is plainly out of accord with the applicable decisions of this Court..... 44

(4) The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court 49

(5) This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court 51

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SUPREME COURT OF THE UNITED STATES.

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WALTER A. LAVENDER, Administrator
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Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

Comes now Walter A. Lavender, Administrator of the Estate of L. E. Haney, Deceased, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the opinion and judgment of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 4th day of June, 1945, in the case lately pending in said Supreme Court of Missouri, Division No. 1, styled Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased (Plaintiff), Respondent, v: J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Com-

(R. 219, 305). A short time before Haney was injured and killed, he opened the switch and the Frisco passenger train started to back into the station over the switch. There were no eyewitnesses to the accident. Haney must have stood as his duty required him to, near the switch waiting for the train to back in and clear the switch, so he could close it. During the time the train was backing past Haney at about 8 or 10 miles an hour, something struck Haney in the back of the head, knocking him to the ground and rendering him unconscious. Haney did not close the switch after the train backed in as it was his duty to do and he did not regain consciousness, but died a short time thereafter.

Doctor W. E. Turner testified that he examined Haney's body soon after the accident and assisted in performing an autopsy on it; that there were no injuries externally on the body (R. 281); that his face was bruised where it struck the ground and there was a bruise on the back of his head, which caused a fracture of the skull that resulted in death (R. 282); that in his opinion, Haney's injury and death was caused by a small round fast-moving object striking Haney in the back of the head, which could have been a rod fastened to a train backing at the rate of 8 or 10 miles an hour (R. 283, 286). Witness Mee, the Engineer, testified the train backed into the station around a bad curve at about 10 miles per hour (R. 150). Witness Gates, who picked up Haney's white cap, testified that it had a mark on the outside of the back about $1\frac{1}{2}$ inches long and an inch wide, and that the mark ran in an angle downward to the right of the center of the back of the head (R. 204, 205). Witness Gates further testified that it appeared to him that something had struck Haney in the back of the head above the ear and a little to the right of the center of the head and that he was told that the mark corresponded with the location of the injury on Haney's head (R. 204, 207). Witness Farmer, a railway mail clerk,

testified that the mail hooks hung down loose on the outside of the Frisco mail cars with a round knob at the bottom 80 inches above the bottom of the rail, which was 7 inches high, and that the mail hooks were not fastened at the bottom and would pivot and swing out 12 inches on the sway of the train (R. 97). Witness Drashman testified that the mail hooks could swing out three feet to the side of the train (R. 263). It was shown that there was a Frisco mail car coupled near the engine in the Frisco train which had a mail hook on either side, which were fastened at the top through brackets on the outside of the car. There were 12 cars in the Frisco train. The bottom of these mail hooks can swing out with the tip end of the hook about three feet to the side of the car (R. 72). Several witnesses testified that the ground at the switch where Haney was killed was covered with piles of cinders and was high and uneven and in some places was 18 inches to two feet above the rail (R. 298, 267 and 305). The deceased was shown to be five feet 7½ inches tall (R. 95).

Alvin Haney testified that he found a spot of blood 6 or 8 inches across after Haney's body was removed near the switch 3 or 4 feet north of the north rail of the track on which the Frisco train backed into the station upon high and uneven ground (R. 92, 93 and 298). It was shown that the passenger trains have an overhang of about 2½ feet out beyond the side of the rail (R. 206). The accident happened at about 7:30 P. M. There was no artificial light at the place. Witness Mee, the engineer, testified that he could not see a 2½-inch pipe 50 feet away at the switch (R. 152). Alvin Haney testified that he could not see a 3-inch pipe 25 feet away where his father was killed (R. 317). Defendant's Witness O'reagh testified that it was so dark that you could not see how a man was dressed ten feet away (R. 144). A light was erected over this switch immediately after the accident (R. 27, 309), which illuminated the place for some distance (R. 310). Witness

Drashman testified that he arrived at the scene of the accident within a few minutes after Haney's body was found lying face down (R. 265) and that an Illinois Central switchman there at the place at the time said that something sticking out from the train hit Haney. Witness Bundy testified that they turned Haney's body over while he was there (R. 32) and that he was not there over five minutes (R. 33). Witness Drashman, who was in the employ of one of the defendants, made several statements about what was said at the time Haney's body was found. We quote from the record (R. 242-243):

“ . . . I heard someone say that is what happened.

Q. Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir.”

Defendants would not permit their employee to explain.

The witness testified again (R. 255):

“Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was. * * *

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time.”

Again witness Drashman testified (R. 75):

“As to the man who made the statement about something sticking out of the train, I thought he was

an Illinois Central switchman; but as a matter of fact, I did not make any investigation or any effort to find out whether that man was working for the Illinois Central or for the Yazoo & Mississippi Valley Railroad, and I do not know what railroad company that man was working for."

Redirect Examination, by Mr. Edwards:

"I do know though from his appearance that he was a railroad switchman. He was dressed and had all the appearance of a railroad switchman."

The opinion gives as one reason why the Supreme Court finds that Haney was not struck by something projecting from the side of the car; that the evidence is to the effect that Haney's body was lying with the head toward the track with the body extending north at a right angle to the track. This conclusion is not in accordance with the testimony of the witnesses. Witness Bundy, in describing the direction in which Haney's body was lying, stated that his head was pointing southeast (R. 213).

"Q. His head was pointing, as you say, southeast?
A. Yes, sir.

Q. And this Frisco train had just backed east and toward north? A. Yes, sir.

Q. Into the station? A. Yes, sir."

Witness Drashman testified that Haney's body was lying parallel to the track when it was first found (R. 264):

"Q. Well, did you see Haney's body down there?
A. Yes, sir.

Q. And how far was it from the Frisco switch, from the main line? A. I don't know, I didn't measure it.

Q. How far was it from the Frisco tracks? A. I didn't measure it.

Q. What would be your best judgment? A. About 6 feet.

Q. About 6 feet. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well, I think the whole body."

The Supreme Court's opinion gave as one of its reasons for finding that a mail hook did not strike Haney was because they claimed that the evidence showed that the track where Haney was killed was straight. This was error. Defendant's witness Mee, engineer in charge of the train that killed Haney, testified (R. 150):

"After I got moving, I was going about 8 miles an hour. Of course, we have to increase the speed a little bit around the curve, because it is a bad curve and I suppose you would be going about 10 miles an hour there. I don't think we could have been going any faster than that around a curve."

Witness Bundy testified that the track where Haney's body was found was on a curve (R. 213), as he stated the Frisco train had just backed east and north before Haney was found.

The Supreme Court of Missouri's opinion states that the evidence shows that Haney was on the south side of the track when the Frisco passenger train backed past him, that Rule No. 104 required Haney to cross to the south side of the track after opening the switch and further that defendant's witness Creigh testified that he saw Haney go to the south side of the track after he opened the switch. The evidence at the trial contradicted all of these claims in that Mrs. Haney, the deceased's widow, testified that she had heard it was claimed by Mr. Creigh that her husband had gone to the south side of the track after he had opened the switch and that she called upon Mr. Creigh, the conductor, and he told her (R. 159):

"He said his memory wasn't so good. He said he didn't remember anything about my husband going

to the south side of the track. He didn't know where he was standing or anything about it; and he couldn't remember; he didn't see him afterwards."

Defendant's witness Brusio testified that it was Haney's duty after he had opened the switch to remain there north of the track; that that was the custom and practice (R. 305):

"Q. Haney's next duty, after that train backed in there, was to close that switch, wasn't it? A. Yes, sir.

Q. And he should have done that after the train backed in there, immediately after the train cleared the switch? A. Yes, sir.

Q. That was a custom for him to do that? A. Yes, sir; that was his duty.

Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

Witness Arnold testified (R. 219):

"Q. And then after giving such a signal to back up—that is the signal to back up you are talking about? A. Yes, sir.

Q. You did give such a signal after you had thrown the switch and opened it? A. Yes, sir.

Q. Then what would you next do? A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean? A. Yes, sir.

Q. And when the train backed up, then next what would you do? A. Close the switch."

The Instructions.

Petitioner, the plaintiff in the trial court, submitted his case to the jury as to each of the defendants under separate instructions. Plaintiff's instruction No. 2 submitted the question of the liability of defendant trustees of the

St. Louis-San Francisco Railway Company for the death of Haney (R. 164-165). It required the jury to find among other things that a rod or other object was extending out to the side of the train as it passed Haney and that the defendant was guilty of negligence in permitting the object to swing out and that Haney was killed as a direct result of such negligence, if any. The liability of the Illinois Central Railroad Company was submitted to the jury under plaintiff's instruction No. 4 (R. 166-168). Instruction No. 4 required the jury to find that the ground where Haney was required to work, was high and uneven and that the light was insufficient and inadequate and the place was unsafe and dangerous and that the defendant Illinois Central Railroad Company had failed to exercise ordinary care to make said place reasonably safe and that such failure, if any, constituted negligence and that if they found that Haney was injured and killed as a direct result of said place being unsafe and dangerous, then they should find for plaintiff and against the Illinois Central Railroad Company. This instruction did not require the jury to find that Haney was killed by something sticking out from the side of the passing train. No complaint was made against the correctness of this instruction on appeal in the Missouri Supreme Court.

The Verdict and Judgment.

The case was submitted to the jury as to each of the defendants on the above-mentioned instructions and on a measure of damage instruction. The jury returned a verdict against both defendants in favor of petitioner for \$30,000.00. A judgment was entered in the trial court against both defendants in favor of petitioner for the sum of \$30,000.00 and costs. Both defendants filed motions for a new trial and the trial court overruled said motions. Thereafter, the defendants were allowed separate appeals.

to the Supreme Court of Missouri. Thereafter, respondents herein, as appellants in the State Court, duly perfected their separate appeals from said judgment in favor of petitioner in said cause, and said cause was briefed, argued and submitted in Division No. 1 of said Supreme Court on May 1, 1945 (R. 320). Thereafter, on June 4, 1945, said Division No. 1 of said Supreme Court of Missouri, in an opinion filed in said cause on said day (R. 320), ruled that there was no substantial evidence to support the submission of the case to a jury under the hypothesis that a mail hook struck Haney, the deceased. The opinion further held that a mail hook could have struck Haney but that it did not. The opinion also held that the testimony of witness Drashman as to the statement made to him by an Illinois Central switchman a few minutes after Haney's body was found at the scene of the accident, that Haney had been struck by something protruding from the side of the train, was not competent under the res gestae rule, and that there was not sufficient evidence to submit the question of whether something sticking out from the Frisco interstate passenger train struck Haney, and that there was not sufficient evidence that the insufficient light and high and uneven ground and unsafe and dangerous place to work in whole or in part caused or contributed to cause the injury and death of Haney. The Missouri Supreme Court in its opinion held that "it would be mere speculation and conjecture to say that Haney was struck by a mail hook," and further held that all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusions from the facts in this case, and it also held that they would not affirm the verdict and judgment for petitioner, because they said that it was based on "conjecture and speculation." The Supreme Court of Missouri, by its opinion and judgment rendered and entered June 4, 1945, reversed the \$30,000.00 judgment in favor of petitioner.

Thereafter, on the 18th day of June, 1945, and within the time allowed therefor by the rules of said Supreme Court of Missouri, petitioner duly filed in said cause, in said Division No. 1 of the Supreme Court of Missouri, his motion for a rehearing and to transfer said cause to the court in banc and suggestions in support of said motion. The Highest Court of the State of Missouri under Section 4 of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri, providing that "when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court (in banc) for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the Court (in banc) for its decision."

Thereafter, on the 2nd day of July, 1945, petitioner's said motion for a rehearing and to transfer said cause from said Division No. 1 of the Supreme Court of Missouri to the Court (the Supreme Court of Missouri) in banc, was by Division No. 1 of the said Supreme Court overruled, whereby and on which day said judgment of said Division No. 1 of the Supreme Court of Missouri in said cause, reversing said judgment in favor of petitioner, became final.

Petitioner, prior to July 17, 1945, delivered to the Clerk of the Supreme Court of Missouri his motion to modify the opinion of the Supreme Court of Missouri in which said motion petitioner asked that said Supreme Court modify its opinion by stating the issues and the facts in accordance with the record, as will more particularly appear in said motion to modify. The Clerk of the Supreme Court of Missouri refused to file petitioner's said motion to modify. Petitioner thereupon, on July 17, 1945, filed in said cause in the Supreme Court of Missouri, his motion for leave to file said motion to modify the opinion, for the reason that no rule of the Supreme Court of Missouri specifies or provides when a motion to modify an opinion should be filed. Thereafter, on September 4, 1945, the

Supreme Court of Missouri entered its order in said cause overruling petitioner's motion for leave to file his motion to modify the opinion and gave as a reason for said ruling that said motion to modify was not filed within the time allowed for filing a motion for rehearing. The Supreme Court of Missouri did on September 11, 1945, on motion of petitioner, order its mandate stayed in said cause.

The duly certified record, including all of the proceedings in said cause in said Circuit Court of the City of St. Louis, Missouri, and in said Division No. 1 of the said Supreme Court of Missouri, is filed herewith under separate cover.

Thereafter this Honorable Court on the application of your petitioner did on September 24, 1945, order the time extended in which your petitioner might file a petition for certiorari in this cause to and including November 2, 1945.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, Title 28, U. S. C. A., sec. 347, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute, of, or commission held or authority exercised under, the United States.

The judgment of the Supreme Court of Missouri, Division No. 1, sought to be reviewed was originally entered on June 4, 1945 (R. 320). A motion for a rehearing and to transfer said cause from Division No. 1, to the Missouri Supreme Court in banc, was filed on June 18, 1945, within

the time provided by the rules of the Supreme Court of Missouri (R. 332) and said motion of petitioner for a rehearing and to transfer said cause to the Missouri Supreme Court in banc was denied by said Division No. 1 of the Supreme Court of Missouri on July 2, 1945, which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final. Division No. 1 of the Supreme Court of Missouri, upon its refusal to grant a rehearing and to transfer the cause to the Court in banc, was the highest Court of the State in which a decision could be had in said cause; and in said cause, petitioner specially set up and claimed a right under a statute of the United States, namely, the Employers' Liability Act, 45 U. S. C. A., sec. 51, Act of April 22, 1908, c. 149, sec. 8, 35 Stat. 65 (R. 2-6). Which right was denied petitioner by said Supreme Court of Missouri, Division No. 1.

Cases thought to sustain the jurisdiction are:

Seago v. New York Central R. Co., 315 U. S. 781, 62 Sup. Ct. Rep. 806;

Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. Rep. 934;

New York Central R. Co. v. Marcone, 281 U. S. 345;

Puget Sound Power & Light Co. v. County of King, 264 U. S. 22.

QUESTIONS PRESENTED.

The Questions presented by Petitioner's Petition herein for a Writ of Certiorari are:

1. Whether, in an action against a Railroad carrier under the Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover for the death of an employee of defendant railroad, the evidence relating to the cause of death sufficed, under the applicable decisions of this Court, to warrant

the submission to a jury of the issue of negligence in striking the railroad's switch-tender, Haney, with a mail hook, rod or other object projecting from the side of a train operated by the railroad employer, or, whether plaintiff's case may be said to rest entirely upon such inferences that the submission thereof to a jury would invite a verdict based upon speculation and conjecture.

The evidence adduced by plaintiff, together with the reasonable inferences fairly and reasonably arising therefrom, tends to show that the deceased was a switch-tender assisting in the movement of the interstate passenger train; that he threw the switch permitting the train to back over the switch track into the station; that his duties required him to wait at the switch until the train had cleared and then to close it; that after the train passed, he was found unconscious lying face down within 5 to 6 feet from the track over which the train had passed, with his head pointing in the direction of the movement of the train, with a diagonal wound across the back of his head, at the base of his skull, extending upwards, causing a fracture of the skull, from which he died without regaining consciousness. The doctor who performed a post-mortem testified that in his opinion the wound was such as might have been caused by a small, round, fast moving object, which could have been a rod attached to the side of a train backing 8 or 10 miles an hour. The evidence tended to show that the deceased was standing on a mound of cinders, which raised his head to a height where it would have been struck by a mail hook extending from the side of the passing train; that there was a mail hook swinging loose attached to a car near the engine of the 12-car train that passed and that said hook would swing out on the sway of the train or on rounding a curve going at the rate of 8 to 10 miles per hour; that the train was rounding a bad curve at such a rate of speed at the place where deceased was afterwards found unconscious with the kind

of a wound in the back of his head which would have been made if a mail hook had struck him there. There was no evidence of any kind that anything else could have killed Haney.

2. Whether, in an action under the Employers' Liability Act for the injury and death of a switch-tender employed in interstate commerce by defendant carrier in its switchyard, the evidence relating to a *res gestae* statement sufficed, under the applicable decisions of this Court, to warrant the submission of the case to the jury, or whether such submission would invite a verdict based upon conjecture and speculation as held by Division No. 1 of the Supreme Court of Missouri. The evidence adduced, together with all fair and reasonable inferences to be derived therefrom, positively showed that an employee of defendant Frisco Railroad Company positively stated that, when he arrived at the scene of the accident a few minutes after deceased's body had been found and before it had been turned over or moved, he heard an Illinois Central switchman, there at the scene, at the time, state that:

• "Something sticking out from the train hit Haney," and "that is true."

3. Whether, in an action under the Federal Employers' Liability Act, for the injury and death of a switch-tender employed in interstate commerce by defendant carrier in its switchyard, the action of the highest court in a state in which a decision could be had in said cause in ruling that plaintiff made no case for the jury, against his employer for failure to furnish a safe place to work, and without taking into consideration undisputed testimony favorable to plaintiff, was erroneous and not in accord with the applicable decisions of this Court. There was substantial evidence that the place of work furnished decedent was dangerous and unsafe and that his death was caused by such

dangerous and unsafe place of work. Plaintiff submitted his case as against the Illinois Central Railroad on an instruction requiring the jury to find that the ground where Haney was required to work was high and uneven and that the light was insufficient and inadequate and the place was unsafe and dangerous and that said Railroad had failed to exercise ordinary care to make said place reasonably safe and that such failure constituted negligence before they should find against the I. C. Railroad. The jury so found. The evidence proving such place was dangerous and unsafe was clear, cogent and convincing; it was uncontradicted and undisputed. The evidence showed that there were mounds and piles of cinders from 18 inches to 2 feet above the level of the rail and that there were no artificial lights; that it was at nighttime and objects could not be seen and distinguished 10 feet away; and that if Haney had stood upon such mound he would have been hit on the head by the swinging mail hook as the train backed past him around the curve.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

This action is brought for the death of a Railway employee under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 1, Act of April 22, 1908, § 149, Sec. 1, 35 Stat. 65). Decedent was a switch-tender employed in interstate commerce. At the time of his death, he was switching an interstate passenger Frisco train over the tracks of defendant Illinois Central Railroad Company into its station at Memphis, Tennessee. It was admitted in evidence that the Frisco Railroad Company paid the Illinois Central Railroad Company \$1.87½ for each car in said passenger train and that the Frisco Railroad Company reimbursed the Illinois Central Railroad Company for \$2 12

of Haney's wages under an agreement between the said two defendant Railroad Companies. Both defendants admitted that Haney was in the performance of his duty at said time in the opening and closing of said switch in the switching of said interstate passenger train into the station. The evidence showed that the Frisco passenger train consisted of 12 cars, engine and tender, with a mail car next to the tender; that said mail car was equipped with mail hooks on each side of the mail car; that said mail hooks were fastened at the top, swinging loose at the bottom, with the loose end terminating in a rounded end or ring or knob; that when said passenger train backed around the curve and over the switch which had just been opened by decedent, it was moved at the rate of 8 to 10 miles per hour; that when mail hooks on mail cars round curves they will swing outwards a distance from 12 inches to 3 feet from the side of the car (R. 97, 269). The bottom of the hook when at rest, was 80 inches above the bottom of the rail (R. 97); that when the car swayed or moved around the curve the bottom of the hook would swing out in an arc with its distance from the ground increasing as it extends out. Haney was 5 feet, $7\frac{1}{2}$ inches tall, which is $67\frac{1}{2}$ inches from the ground. There were mounds of cinders near the track where Haney was stationed to perform his switch duties and where he was later found dead. These mounds were from 18 inches to 2 feet above the top of the rail (R. 267, 298, 360). The rail was 7 inches high. Therefore, Haney standing on a level with the rail $67\frac{1}{2}$ inches tall, when he stood upon a mound 18 inches high, would place him $85\frac{1}{2}$ inches above the top of the rail. The knob end of the mail hook was 73 inches from the top of the rail. This would place the back of his head, where the wound was found, directly at the height where the mail hook, fastened to the side of the passing train, would have struck him. There was evidence by Doctor Turner, who performed the post-mortem, that Haney's skull had

been fractured, causing death; that the wound was caused by a small, round, fast-moving object striking deceased in the back of the head and that such wound could have been caused by a rod attached to the side of a train backing 8 or 10 miles an hour (R. 282-284). Witness Gates, another switch-tender, testified that he examined Haney's white cap immediately after he was found and that it had a dark mark about 14½ inches long and an inch wide which ran at an angle diagonally upward across the outside of the back of the cap which corresponded to the wound on Haney's head (R. 204, 205 and 207). There were no other injuries except bruises on his face caused by ~~it~~ striking the ground when he fell forward in the direction in which the train was moving. A Frisco employee testified that he arrived at the scene of the accident a few minutes after Haney's body had been found and before it had been turned over or moved, and that he heard an Illinois Central switchman, there at the scene, at the time, state that (R. 242-243, 255):

“Something sticking out from the train hit Haney
• • • that is true.”

There was no evidence of any kind adduced that anything happened to Haney to cause his death other than the movement of the train with something projecting therefrom. There was testimony that there were no other rods, pipes, weapons or anything that could have caused the wound in Haney's head found anywhere near the scene of the accident, with the exception of his own pistol which had slipped out of his pocket and was lying under his body (R. 32, 114, 212).

This evidence, with the inferences fairly and reasonably arising therefrom, tended to show that defendants negligently caused Haney's death by striking him with some object projecting out from the side of the Interstate train. Nevertheless, Division No. 1 of the Supreme Court of Missouri, in its opinion in said cause (*Lavender v. Kurn et al.*)

189 S. W. 2nd 253), ruled that plaintiff failed to make a case for the jury and ruled that the submission of the case to the jury would invite a verdict based upon conjecture or speculation. Said ruling is erroneous and not in accord with the applicable decisions of this Honorable Court holding that on the question where a case is one for the jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that the credibility of the witnesses and the weight to be given to their testimony are for the jury; and that if, on the issue of liability reasonable and fair-minded men may honestly draw this inference from the evidence, such issue is not one of law for the Court, but one of fact for the jury.

(A) The circumstantial evidence commented on above was sufficient to take the case to the jury irrespective of the statement of defendant Illinois Central Railroad Company's employee, made at the time the body was found, that Haney had been struck by something projecting from the side of the defendant Frisco's interstate passenger train. All circumstances unequivocally proved that Haney was performing his duty and that he had thrown the switch for the passage of the Frisco passenger train; that the train backed past Haney in the dark; that his duties required him to remain at that switch and close it immediately after the train passed (R. 219, 305). When it was found that the switch was not closed, investigation was immediately made and Haney was discovered near the switch, unconscious with a fractured skull, 5 or 6 feet from the track over which the train had just passed. The evidence further showed as above mentioned that the train contained a mail car with a swinging mail hook on each side which could have struck him and fractured his skull. The Missouri Supreme Court's opinion admits that Haney could have been so struck as the jury found (R. 325), but not

cludes that he was not so struck. Under the law such evidence was amply sufficient to take the case to the jury.

(B) The circumstantial evidence above mentioned under Subdivision A is supplemented by the testimony of defendant Drashyjan that an Illinois Central switchman had said, immediately after the body had been found, that Haney had been struck by something projecting from the side of the interstate train. The Missouri Supreme Court held that the statement was incompetent and erroneous, saying:

“The statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestae* rule.”

We submit the evidence on this point was clear and positive that the Illinois Central switchman had said that:

“Something sticking out from the train hit Haney,”
and “That is true” (R. 75, 242-243, 255).

The law is that such statements are proper and that when admitted by the trial court should be sustained by an appellate court.

II.

In this case, Petitioner claimed the right to recover under the Federal Employers' Liability Act for the death of an employee of respondent Illinois Central Railroad Company for the negligence of said Company in failing to furnish its employee a safe place to work. The evidence clearly showed that at the place he was required to work the ground was high and uneven near the switch where decedent was working and that the light was so insufficient and inadequate that Haney could not see and be seen. The evidence shows that while Haney was in the performance of his duty, switching an interstate passenger train in such

dark and unsafe place, he was struck while the train was passing him and before he had had an opportunity to complete his work by closing the switch after the train had passed over it. Respondents claimed there was no need for any light at the switch, but after Haney was killed, erected one over the switch (R. 206, 309). Such testimony regarding the matter was plainly for the jury. The decision of Division No. 1 of the Supreme Court of Missouri that no case was made for the jury and that there was no substantial evidence that the uneven ground and the insufficient light were causes or contributing causes of the death of Haney are not in accord with the ruling of this Court.

Instruction No. 4, which submitted the question of unsafe place to work as to defendant Illinois Central Railroad Company, required the jury to find that the ground where Haney was required to work was high and uneven and that the light was insufficient and inadequate, and that the place was unsafe and dangerous and if the jury so found that the unsafe and dangerous place could have caused Haney's death they would find for plaintiff. It required the jury to find only that Haney was killed as a direct result of said place being unsafe and dangerous. The decision of the Supreme Court of Missouri denied the jury the right to find the proximate cause of Haney's death and is violative of the fundamental principles to be observed in passing upon a defendant's demurrer as announced and applied in a long line of decisions of this Court holding that, in determining whether a case is made for the jury, the plaintiff will be accorded the benefit of every inference favorable to him fairly and reasonably deducible from the facts in evidence; that conflicts in the testimony, the credibility of the witnesses and weight of evidence are for the jury; and that a negligence case will never be withdrawn from the jury if on the issue of negligence where reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence. It is a matter

of prime public importance that the rights vouchsafed to railroad employees and their dependents by the Federal Employers' Liability Act be recognized and enforced by every court in the land in which an action may be brought under the Act. To that end, and to the end, too, that right and justice may prevail in this case, this Honorable Court's writ of certiorari should issue herein.

III.

Petitioner in his motion for a rehearing (R. 333-367) called the Missouri Supreme Court's attention to its failure to take cognizance of the testimony which it branded as not properly admitted under the *res gestae* rule, but said motion was overruled. Such action on the part of that court was erroneous and not in accord with the applicable decisions of this court holding that on the question of whether a case for the jury is made all of the material evidence bearing upon that issue must be considered. Thereby, petitioner was denied a Federal right calling for the issuance by this court of its writ of certiorari herein to bring before this court the entire record for review.

IV.

The Supreme Court of Missouri, Division No. 1, by its said decision and judgment in this cause, denied petitioner a right specially set up and claimed by him, as the administrator of decedent's estate, under the Federal Employers' Liability Act, namely, the right to have his case submitted to a jury on the theory that the injury and death of said deceased, while employed by respondents in interstate commerce, resulted from the negligence of respondents, when there was evidence adduced rightfully engendering that conclusion. It is submitted that the denial to petitioner of such right plainly calls for the issuance by this Court of its writ of certiorari herein.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the Supreme Court of Missouri to the end that the said opinion and judgment of Division No. 1 of said Supreme Court of Missouri in said cause of Walter A. Lavender, administrator d. b. m. of the Estate of L. E. Haney, deceased, Respondent, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation, Appellants, No. 39,174, be reviewed by this Court, as provided by law, and that upon such review said judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

**N. MURRY EDWARDS,
JAMES A. WAECHTER,
DOUGLAS H. JONES,**

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Hancy, deceased (Plaintiff), Respondent, v. J. M. Kurn et al., Trustees of the St. Louis San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation (Defendants), Appellants, which petitioner here seeks to have reviewed, is reported in 189 S. W. (2nd) at page 253, and appears on pages 320-331 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's Petition for a Writ of Certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts on the points involved in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of Missouri, Division No. 1, in its said opinion in said cause, erred:

(1) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor.

(2) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondent, the Illinois Central Railroad Company, a corporation.

(3) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the hypothesis that respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, negligently caused, suffered, and permitted a rod, stick or other object to project out or swing out from the side of its interstate passenger train and to strike and injure and kill Haney, the deceased.

(4) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the hypothesis that respondent Illinois Central Railroad Company negligently failed to furnish its employee, Haney, the deceased, with a safe place to work, which negligence in whole or in part resulted in Haney's death.

(5) In holding and deciding that to submit the case to the jury, upon the theory that Haney's death was caused by something protruding out on the side of the interstate train as it backed in to Grand Central Station which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(6) In holding and deciding that to submit the case to the jury, on the theory that respondent Illinois Central Railroad Company negligently failed to furnish Haney, its employee, with a safe place to work and negligently furnished him with a dangerous place to work which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(7) In failing and refusing to consider, on the question of whether the case was for the jury as to each of the two Railroads, material testimony and evidence favorable to petitioner, having an important bearing on that issue.

(8) In inadvertently and erroneously drawing the wrong conclusions and making the wrong description of the evidence as to each of the Railroad respondents on the question of whether the case was one for the jury and in failing to consider testimony in evidence favorable to petitioner having an important bearing on the issues tried and decided by the trial court.

(9) In failing to properly consider and sustain petitioner's motion for a rehearing.

(10) In failing and refusing to amend the opinion in accordance with petitioner's motion to modify same.

SUMMARY OF THE ARGUMENT.

(1)

The evidence adduced at the trial of said cause of Walter A. Lavender, administrator d. b. n., of the Estate of L. E. Haney, deceased, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and the Illinois Central Railroad Company, on the issue of respondent's liability for the injury and death of said L. E. Haney under the Employers' Liability Act as for negligence on the part of respondent, J. M. Kurn et al., Trustees, etc., in permitting something to protrude out to the side of their interstate passenger train as it passed Haney, the deceased, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(2)

The evidence adduced at the trial of said cause of Walter A. Lavender, d. b. n., of the Estate of L. E. Haney, deceased, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation, on the issue of respondent, Illinois Central Railroad Company's liability for the injury and death of said Haney, under the Employers' Liability Act as for negligence on the part of respondent, Illinois Central Railroad Company, in failing to furnish its employee Haney a safe place to work, and in furnishing him a dangerous place to work, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(3)

The ruling of Division No. 1 of the Supreme Court of Missouri that the evidence adduced in said cause constituted no substantial evidence to warrant the submission of the case to the jury on the hypothesis that respondent trustees negligently caused, suffered and permitted a rod, or other object to protrude out to the side of its interstate train and that respondent Illinois Central Railroad Company failed to furnish Haney, its employee, with a safe place to work and furnished him with a dangerous place to work that resulted in Haney's death, and that to submit the case on these theories would invite a verdict based on conjecture or speculation, is not in accord with the applicable decisions of this Court holding that on the question whether a case is made for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that conflicts in the evidence, the credibility of witnesses, and the weight to be given to their testimony, are for the jury; and that, if on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one for the jury.

- Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29;
Seago v. N. Y. Cent. R. Co., 315 U. S. 781, 62 Sup.
Ct. Rep. 806;
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, 16 L. Ed.
193, 58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345,
74 L. Ed. 892;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934;
Lumbra v. United States, 290 U. S. 551, 553, 78 L.
Ed. 492;

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;
Best v. District of Columbia, 291 U. S. 411, 78 L. Ed. 888;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96;
Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410;
Barney v. Schneider, 9 Wall. 248, 19 L. Ed. 648;
Pawling v. United States, 4 Cranch. 219, 2 L. Ed. 601.

(4)

The State Court erred in failing to take into consideration testimony highly favorable to petitioner given by witnesses Drashman, Alvin Haney, Brusio, Turner and Gates. Under both the Federal rule and the State rule whether the case was one for the jury was a matter to be determined on appeal by a consideration of all the evidence material to that issue.

Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Stauffer v. Metropolitan Street Ry. Co., 243 Mo. 305, 316;
Lorton v. Mo. Pac. R. Co., 306 Mo. 125, 137;
Rosenssweig v. Wells, 308 Mo. 617, 273 S. W. 1071;
Johnson v. Southern Ry. Co., 351 Mo. 1110, 175 S. W. 2nd 802.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the State Court in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a Federal right by the opinion and judgment below.

Great Northern Ry. Co. v. State of Washington,
300 U. S. 154, 81 L. Ed. 573;

United Gas Public Service Co. v. State of Texas,
303 U. S. 123, 143, 82 L. Ed. 702;

Chicago Great Western R. Co. v. Rambo, 298
U. S. 99.

ARGUMENT.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 143, Section I, 35 Stat. 65), brought by Walter A. Lavender, Admr., d. b. n. of the Estate of L. E. Haney, deceased, for the benefit of the widow and children of the deceased, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the negligence of the respondent, J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, Defendant, in negligently causing, suffering, and permitting a rod or other object to project out from the side of its interstate passenger train and the negligence of respondent, Illinois Central Railroad Company, in failing to furnish Haney, the deceased, its employee, with a safe place to work.

The pertinent provisions of the Employers' Liability Act are:

"Every common carrier by railroad while engaged in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The undisputed evidence in the record is that L. E. Haney was a switch tender and was working at the duties assigned to him at the time he was injured and killed December 21, 1939, in the railroad yards near the Great Central Station at Memphis, Tennessee. The undisputed evidence also shows that it was Haney's duty to open the switch for the respondent, trustees interstate company passenger train on its regular run from Birmingham,

Alabama, to Grand Central Station at Memphis, Tennessee. The evidence shows that Haney opened the switch and the interstate passenger Frisco train backed over said switch into Grand Central Station; that Haney's duty after opening the switch was to remain at the switch and close it when the passenger train had passed over. Haney opened the switch but was killed before he closed it. Respondent, Illinois Central Railroad Company, was in possession of and owned Grand Central Station (R. 190), and had a contract with respondent, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railroad Company for the joint use of Grand Central Station by the Trustees and Illinois Central Railroad Company, under which the Trustees paid the Illinois Central Railroad Company \$187¹/₂ for each passenger car switched into Grand Central Station, which included all of the cars in the Trustees' interstate commerce train, being switched into the station at the time Haney was killed (R. 193). The undisputed evidence at the trial further proved that the Trustees of the Frisco Railroad paid the Illinois Central Railroad 2 12 of Haney's, the deceased's, wages to reimburse it for that amount (R. 19). In addition to this, the Trustees paid the Illinois Central Railroad Company 2 12 of the other two switch tenders' wages, who worked at the same switches which Haney maintained at the time he was killed and also paid 2 12 of the cost of electricity furnished for operation of color signals used at the switches where Haney worked (R. 125-128).

The Interstate Commerce Act itself provides that where any part of an employee's duty directly affects interstate commerce he shall be deemed for the purpose of the Federal Employers' Liability Act an employee of the carrier for whom the employee is furthering the interstate movement.

Chapter 2, Title 45, U. S. Code, Section 51, in its title provides for the liability of carriers for injuries to em-

ployees and defines "employees." This section of the Act reads, in part, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *."

The definition of employee continues in the words of the Act in the second paragraph as follows:

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter (Apr. 22, 1908, ch. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, ch. 65, Sec. 1, 53 Stat. 1404)."

We therefore believe that it is clear beyond doubt that Haney was employed in interstate commerce at the time of his death by the respondents' railroads.

(1)

Petitioner submits that the evidence adduced at the trial of the cause in the Circuit Court of the City of St. Louis, Missouri, on the issue of respondent's liability under the Employer's Liability Act for the death of their employee, Haney, a switch tender, as for negligence on the part of both respondents as shown by the record of the cause in Division ≈ 1 of the Supreme Court of Missouri filed herewith, amply sufficed to make those issues one for the jury, and that Division ≈ 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issues submitted.

At and prior to the time that the deceased was killed, he was on duty as a switch-tender in the railroad yards near Grand Central Station at Memphis, Tennessee. On December 21, 1939, at about 7:30 P. M., Haney, the deceased, in the performance of his duties threw or opened a switch to permit the interstate passenger train of respondent Trustees from Birmingham, Alabama to back over said switch and into Grand Central Station. Haney's duties required him to wait at the switch until the passenger train had cleared and then to close it and return to his shanty or headquarters nearby. When Haney closed the switch it would change a signal light over the switch from red to blue and permit other trains and engines to use the crossing. After the passenger train cleared the switch, the light remained red and the switch opened. On investigation, Haney was found lying face down about five feet north of the north rail of the track over which the train had just passed (R. 216) with his head pointing in the general direction in which the train had just backed in. Haney did not close the switch as it was his duty to do. Haney's only injury was a bruise in the back of the head which caused a fractured skull from which he died, and bruises on his face where it struck the ground (R. 281). Dr. Turner, who examined and assisted in performing an autopsy on Haney's body, testified that the wound on the back of Haney's head was such as would be caused by a round, fast-moving object, which could have been a rod attached to the side of a train backing 8 or 10 miles an hour. Engineer Mee testified that the 12-car passenger train backed in at the rate of 8 or 10 miles an hour (R. 285-287). Witness Gates, another switch-tender working at the next crossing west of Haney, testified that he picked up Haney's white cap after the body was found and that it had a dark mark about an inch and a half long and an inch wide, which ran at an angle across the outside of the back of the cap, which mark corresponded

to the wound on Haney's head (R. 204-205). It was further shown that a Frisco mail car was in the train coupled near the engine (R. 149); that this mail car had a mail hook on both sides of the car, fastened at the top (R. 73), hanging down loose on the outside, with a knob on the bottom, and when at rest was 80 inches above the bottom of the rail (R. 97), which was 7 inches high (R. 97). The knob on the lower end of the mail hook when hanging straight down was, therefore, 73 inches above the top of the rail. The evidence showed that when this mail car swayed or moved around a curve, the mail hooks would pivot and swing out from the side of the car from 14 inches to 3 feet (R. 97, 98, 269). The train was moving around a bad curve at the time Haney was killed (R. 150). There were mounds or piles of cinders near the track where Haney's body was found which were from 18 inches to 2 feet above the top of the rail (R. 267, 298, 300). Haney, the deceased, was shown to be 5 feet 7½ inches tall. He stood 67½ inches from the ground. The mail hook could have, therefore, struck Haney in the back of the head.

One witness testified Haney's body was 5 or 5½ feet north of the track (R. 216). Alvin Haney, the deceased's son, testified he found a spot of blood 6 or 8 inches across, 3 or 4 feet north of the north rail of the track, upon which the train had backed in (R. 93). It was shown that passenger trains such as the one in question have an overhang to the side of the train of 2½ feet (R. 206). Drashman, an employee of the Trustees respondents, testified that he came to the switch a few minutes after Haney's body was found and while it was still lying face down and before it had been turned over, and that a man whom he took to be an Illinois Central switchman, standing at the scene of the accident at the time, stated, "Something sticking out from that train hit Haney" (R. 242, 243, 255). This witness, who was an employee of the defend-

ant trustees, showed by his attitude that he was hostile and made several different statements as to what the switchman had said at the scene of the accident and as to what he saw and heard.

Haney's clothes were not disarranged; there was no evidence of a struggle or fight and no rods, pipes or weapons of any kind were found near the scene of the accident, except Haney's own pistol, which had slipped out of his pocket and was found lying under his body when it was turned over (R. 212). It is therefore clear that the mail hook struck Haney in the back of the head. The jury so found (R. 32, 114).

The Missouri Supreme Court's opinion found that a mail hook could have struck Haney, but that it didn't. *Lavender v. Kurn*, 189 S. W. 2d 253, 1 c. 255 (R. 331). The opinion states:

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

The Missouri Supreme Court's opinion seeks to justify its conclusion that there wasn't sufficient evidence to submit the case to the jury as to the trustees on the theory that something protruding from the side of the train struck and killed Haney, by several different alleged reasons.

First, the opinion states that Haney was seen to go to the south side of the track after he opened the switch for the train to back in and that the trustees' conductor Creagh testified that he saw Haney go to the south side of the track. This was contradicted by the deceased's widow. Witness Creagh testified that it was so dark at the switch that he could not see how Haney was dressed 10 feet away (R. 144).

Mrs. Haney, widow of the deceased, testified that she had heard that Creagh, the conductor, was claiming that her husband, the deceased, went to the south side of the track after he had opened the switch and that she called upon witness Creagh after her husband was killed and asked him if he knew anything about how her husband was killed; that Creagh told her his memory wasn't good and that he didn't remember anything about her husband going to the south side of the track; that he didn't know where he was standing or anything about it (R. 159). The opinion states that according to Rule 104, Haney was supposed to go to the south side of the track after he had opened the switch. This statement overlooks the positive testimony of switch-tender Arnold, an employee of the Illinois Central Railroad Company, on duty at the next crossing north of Haney at the time he was killed, in which he testified that it was Haney's duty after he had opened the switch to "Just stand there and wait till the train got back" and "close it as soon as it cleared" (R. 219), and the testimony of Brusio, employee and witness of the Illinois Central Railroad, who testified (R. 305):

"Q. His duty was to open the switch and remain there until the train backed in, and then go to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

The opinion also erroneously finds that Haney's body was lying with the head toward the track and the legs extending north at right angles to the track as a reason why the mail hook didn't strike Haney. In this conclusion, the opinion overlooks the testimony of witness Bundy, another employee of one of the respondents, to the effect that Haney's head was pointing southeast (R. 213).

"Q. His head was pointing, as you say, southeast? A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north? A. Yes, sir.

Q. Into the station? A. Yes, sir.

Witness Drashman, the hostile witness employee of one of the respondents, testified that Haney's body was lying parallel to the track over which the train had just backed (R. 264).

The opinion assumes that the statement made by the Illinois Central switchman to Drashman was made in sufficient time to be competent under the res gestae rule, but the opinion later erroneously states that the switchman said that Haney was supposed to have been struck by something protruding from the side of the train. Drashman, respondent's employee, made several contradictory statements and the trial court permitted counsel to cross-examine or lead him as a hostile witness (R. 44). In the cross-examination as to what the switchman said and when his testimony and deposition was read, witness Drashman testified (R. 242):

"Q. The next question: 'Q. That is, someone told you at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.' Did you so testify? A. Yes."

Q. And that is true, isn't it? A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir. * * *

By Mr. Edwards: Explain any answer you want to."

But respondent's counsel refused to permit the witness to explain (R. 243).

Again Witness Drashman testified on re-examination (R. 255):

"Redirect Examination, By Mr. Edwards.

"Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from

the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was. . . .

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so; no one else was around there but I. C. men at that time."

The opinion holds that the statement made by the Illinois Central switchman was made in time and under the proper circumstances, but concludes that it was based on hearsay, and therefore incompetent. This is not the correct rule.

Rosenzweig v. Wells, 308 Mo. 617, 273 S. W. 1951;
Johnson v. Southern Ry. Co., 351 Mo. 1119, 17
S. W. 2d 802.

(2)

Petitioner submits that the evidence adduced at the trial of the cause in the City of St. Louis, Missouri, on the issue of respondent, Illinois Central Railroad Company's liability for failing to furnish Haney, its employee, with a reasonably safe place to work was amply sufficient to make that issue one for the jury, and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury. The evidence showed that at the switch and the place where deceased was required to work the ground was hard and uneven with piles of cinders both east and west of the switch (R. 267, 298 and 305). In some instances the cinder piles and mounds were from 18 inches to 2 feet from the rails. There was no artificial light near the switch at all. It was about 7:30 P. M. at night time. It was dark at the place.

Witness Creagh, one of respondents' employees and witnesses, testified it was so dark at the switch that he could not tell how a man was dressed 10 feet away (R. 144). Witness Mee, respondents' employe and witness and engineer in charge of the passenger train, testified it was so dark he could not see a 2½-inch pipe 50 feet away (R. 311). Alvin Haney testified it was so dark that he could not see a 3-inch pipe 25 feet away (R. 317), and that the ground was rough and uneven and from 18 inches to 2 feet above the rail where he found a spot of blood 3 or 4 feet north of the track (R. 93). The evidence was undisputed as to the lack of light. Respondents claim there was no need of any artificial light, but they erected an electric light over the switch after Haney was killed (R. 27, 309). Under the evidence, it was clear that Haney could not see or be seen at the switch for any distance. Under plaintiff's instruction No. 4, which submitted the case as against respondent Illinois Central Railroad Company, the jury were required to find that the ground was high and uneven, the light was inadequate and insufficient, and the place was unsafe and dangerous, and that Haney was injured by reason of the place being unsafe and dangerous before they could find for plaintiff under this instruction. The instruction did not require the jury to find that a mail hook struck Haney. No objection has been made to the instruction on appeal. The Supreme Court's opinion near the end, in four lines, takes away petitioner's right to trial by jury and decides the question of fact against the petitioner in these words (R. 331). *Lavender v. Kurn*, 189 S. W. 253, 1 c. 259:

"And we also rule that there was no substantial evidence ~~that the uneven ground and insufficient light were causes or contributing causes of the death of Haney.~~"

By this cryptic clause the State Supreme Court's opinion decided a question of fact contrary to the jury's finding.

The jury had found under plaintiff's instruction No. 4 that only that the place was unsafe and dangerous, but they found that the unsafe and dangerous place was the proximate cause of the injury and death of Haney. The Supreme Court of Missouri usurped the power of the jury in deciding the question of the proximate cause of Haney's death and reversed the jury's verdict and finding on that question. The State Supreme Court therefore deprived your petitioner and the dependents of Haney of their constitutional right of trial by jury.

(3)

The ruling of the Supreme Court of Missouri, Division ~~=~~1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work which resulted in his death, but that to submit the case on those theories, would invite a verdict based on conjecture and speculation, is plainly out of accord with the applicable decisions of this Court.

It is the well-settled rule of this Court that, on the question whether a case is made entitling the plaintiff to the judgment of a jury, the evidence is to be viewed in the light most favorable to the plaintiff, and the plaintiff is to be accorded the benefit of every inference favorable to him that may fairly and reasonably be deduced therefrom; that it is the province of the jury to resolve any conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is not one of law for the Court but one of fact for the jury.

Meyers v. Pittsburgh Coal Co., 233 U. S. 184, 1. c. 192, 193, 58 L. Ed. 906;

New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Jenkins v. Kurn, 313 F. S. 256, 61 Sup. Ct. 934;

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;

Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410, 1. c. 415.

The principles here applicable have been stated and applied by this Court in a long line of decisions from the time of Chief Justice Marshall (*Pawling v. United States*, 4 Cranch. 219, 2 L. Ed. 601). But in the instant case the state court failed to apply such principles to the facts of this record. We mean no disrespect to the state court when we say that it rendered lip service to the rule that where uncertainty arises from a conflict in the testimony, or if fair-minded men may honestly draw different conclusions from the evidence, the case is one for the jury (R. 331), but inadvertently failed to realize that a proper application thereof to the evidence in this record would compel a holding that the case was one for the jury.

The Missouri Supreme Court first found that it could be inferred that the mail hook struck Haney as alleged in plaintiff's petition and found by the jury. It then searches the record for bits of evidence, which are contradicted by plaintiff's evidence, and finds this contradictory evidence to be true as a matter of fact. For example, the opinion indicates that it finds that Haney after throwing the switch went to the south side of the track. The opinion states that Creagh, respondent's witness, so testified and that Rule 104 provides that Haney should go to the south side of the track. The opinion fails to state or consider the testimony of Mrs. Haney to the effect that

Creagh told her that he didn't know anything about where Haney went; that he didn't know where he was standing, and that his memory was bad. The witness testified that he could not see how Haney was dressed ten feet away. The application of Rule ~~104~~ that Haney should have gone to the south side of the track is disputed by witnesses Arnold and Brusio, employees of the respondents, who stated that it was Haney's duty after opening the switch to remain at the switch and close it as soon as the train had cleared. The State Court refused to correct its opinion on petitioner's motion to modify. The opinion also asserts that Haney's body was lying at right angles to the track. It ignores other testimony that the body was lying with the head pointing in the direction which the train had backed. The opinion also rules out the important testimony of one of respondent's employees, Drashman, in which he stated that one of respondent's, Illinois Central's, switchmen at the scene of the accident, a few minutes after the body had been found, stated that something sticking out from that train hit Haney. The opinion fails to state the issue or to properly decide the case on petitioner's right to recover against the Illinois Central Railroad Company for failing to furnish Haney a safe place to work. It simply states and rules that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. By this ruling the State Supreme Court decided a question of proximate cause against petitioner, when under the law this is a question of fact for the jury and should be left to the jury's finding.

In a suit under the Federal Employers' Liability Act to recover for the death of an employee there was evidence from which the jury could reasonably infer that failure to ring the bell before starting the locomotive was negligence of the defendant, and that that negligence was

the proximate cause of the death; and a judgment for the defendant notwithstanding a verdict for the plaintiff deprived the latter of the right to trial by jury. P. 33.

An appellate court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. P. 35.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, this Court said, I. c. 35:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. * * *

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of Sengo v. New York Central Railroad Company, 315 U. S. 781, 62 Sup. Ct. Rep. 806, this court by memorandum opinion reversed the Missouri Supreme Court in an opinion written at 155 S. W. 2d 126. In a Federal Employers' Liability case, the Missouri Supreme Court, as it has in the case at bar, held that there was not sufficient evidence to take the case to the jury on the theory that no hand lantern back up signal had been given before the train was started, and gave a similar reason as in the case at bar, in that to have held that the case was properly submitted to the jury would permit a verdict to have stood on conjecture and speculation.

In *New York Central R. Co. v. Marcone*, 281 U. S. 345, 74 L. Ed. 892, the deceased employee, employed in the defendant's roundhouse, was run over and killed by an engine while it was being backed out of the roundhouse. There was no eyewitness to the accident. Despite uncontradicted testimony that the whistle was sounded a few minutes before the engine began to move, as a warning that it was to be backed out of the roundhouse, this Court held that from the evidence as a whole and the inferences that might be drawn therefrom reasonable men could with propriety conclude that the defendant was negligent in failing to take reasonable precautions to avert such a casualty.

In the recent case of *Jenkins v. Kurn*, 313 U. S. 256, 61 Sup. Ct. Rep. 934, the plaintiff was a fireman on a moving train. As the train emerged from a curve he observed a train standing not more than six hundred feet ahead on the same track and shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at the plaintiff but did nothing to arrest the movement of the train until the engine was but two or three car lengths from the standing train, at which moment plaintiff leaped from the engine and was injured. The engineer was killed. Division No. 1 of the Supreme Court of Missouri held that no case was made for the jury and reversed the judgment below on the ground that there was "Not even a scintilla of evidence that the engineer understood what plaintiff said" (*Jenkins v. Kurn*, 144 S. W. [2d] 76, l. c. 79).

It happens that the opinions in both the *Jenkins* and *Seago* cases were written by the same Commissioner who wrote the opinion in the instant case. This Court reversed the opinion and judgments in both the *Jenkins* and the *Seago* cases on the ground that the Missouri Supreme Court erred in holding that the cases should not have been submitted to the Jury.

In the Jenkins case the state court failed to reckon with the inferences that arose from the plaintiff's testimony that he "hollered" his warning loudly, that only a narrow space separated him from the engineer, that the engineer's hearing was "all right," that the plaintiff and the engineer could and did carry on "normal conversations" while the train was operating, and that there was comparatively little noise in the cab from the train. The court granted certiorari, and upon a review of the case held that the evidence was ample to warrant the submission of the issue of the engineer's negligence to the jury and reversed the judgment of Division No. 1 of the Supreme Court of Missouri therein (*Jenkins v. Kurn*, 313 U. S. 256). By the same token the judgment of the state court in the instant case should be reversed.

(4)

The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court. In the case of *Choctaw, Oklahoma R. R. Company v. McDade*, 191 U. S. 64, this Court held that it is the duty of a Railroad Company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use the same degree of care to provide properly constructed road bed structures and track to be used in the operation of the railroad. The respondent Illinois Central Railroad Company, therefore, under the holding of this court, was charged with the duty to use due care to provide a reasonably safe place for Haney to work. It did not provide such a place and Haney was killed by reason thereof. The

jury so found. The Missouri Supreme Court erred in holding to the contrary and its opinion is in conflict with this Court's decisions on that question.

Where workmen are engaged in a hazardous occupation, such as underground mining, it is the duty of the master to exercise reasonable care for their safety, and not to expose them to injury by use of dangerous appliances or unsafe places to work, when such appliances and places can, by the exercise of due care, be made reasonably safe.

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 1. c. 191.

"The trial court submitted the case to the jury to determine whether the defendant had failed to discharge its duty of using reasonable care to provide a proper and safe place for Myers to work, that is, in failing to provide adequate lights at a dangerous place and permitting the motor car to be operated without the headlight, and also in permitting an exposed live trolley wire to cross the main track at the sufficient elevation. An inspection of the record satisfies us that there was testimony enough in the case to carry these questions to the jury under the instructions which were given. The duty of the master to use reasonable diligence to provide a safe place for the employes to work, to carry on the occupation in which they are employed is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that character. *Baltimore & Potomac R. R. Co. v. Mackey*, 157 U. S. 72, 87; *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 45; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64; *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 255. Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the

light which it was its duty to provide. Where workmen are engaged in such mines in occupations more or less hazardous, it is the duty of the master to exercise reasonable care for their safety and not to expose them to injury by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, supra, 66; *Kreigh v. Westinghouse & Co.*, supra, 256."

Under both the federal rule and the ~~state~~ rule whether there was evidence to warrant the submission of the issue of the engineer's negligence was a matter to be determined on appeal by a consideration of all the evidence material to that issue. *Western Atlantic R. Co. v. Hughes*, 278 U. S. 496, 73 L. Ed. 473; *Stauffer v. Metropolitan Street Ry. Co.*, 243 Mo. 305, 316; *Lorton v. Mo. Pac. R. Co.*, 306 Mo. 125, 137. The state court failed to observe the rule.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court. *Great Northern Ry. Co. v. State of Washington*, 300 U. S. 154, 81 L. Ed. 573; *United Gas Public Service Co. v. State of Texas*, 303 U. S. 125, 143, 82 L. Ed. 702; *Chicago Great Western R. Co. v. Rambo*, 298 U. S. 99.

Petitioner, therefore, prays that this court issue its writ of certiorari herein, and that the judgment of Division No. 4 of the Supreme Court of Missouri, rendered herein on the 4th day of June, 1945, and which became final on the

2nd day of July, 1945, by the overruling of petitioner's motion for a rehearing and to transfer the cause to the Court in Banc, be reversed.

Respectfully submitted,

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